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IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF ALASKA

JOHN MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	
	)	
HONORABLE PETE	)	
GEREN, Secretary	)	
Of the United States	)	
Army, Department	)	
of Defense, United	)	
States of America,	)	
	)	
Defendant.	)	Case No. 3:05-cv-00264 (JWS)
	)	

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**MOTION FOR ENTRY OF AN ORDER REOPENING THE TIME FOR  
APPEAL FOR A PERIOD OF 14 DAYS OR TO VACATE AND  
REENTER THE JUDGMENT SO THAT A TIMELY APPEAL CAN  
BE TAKEN.**

Plaintiff, JOHN MITCHELL, by and through his attorney, the undersigned, moves the court for entry of an order reopening the time for appeal for a period of 14 days, or, alternatively, vacating the judgment entered on October 2, 2007, and reentering the same so that a timely appeal can be taken to the Ninth

Circuit Court of Appeals.

Under Rule 4, Federal Rules of Appellate Procedure, plaintiff had 60 days, or until December 2, 2007, within which to file a Notice of Appeal, because the United States or an officer or agent thereof is a party defendant.

The Clerk of the District Court sent e-mail notification of "judgment entered" to a former employee of the undersigned's office on October 2, 2007. The existence of this e-mail message was discovered today, January 15, 2008, by the undersigned.

Under Rule 4(6), Federal Rules of Appellate Procedure, the district court,

"if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, re-open the time for appeal of 14 days from the date of entry of the order reopening the time for appeal."

Alternatively, under Federal Rule of Civil Procedure 60(b)(1), if excusable neglect occurs, the Ninth Circuit has permitted a party to move the District Court to vacate and reenter the judgment so that a timely appeal may be taken. This method is in addition to the relief offered by Fed. R. App. P. 4(a)(6). *Rodgers v. Watt*, 722 F.2d 456 (9<sup>th</sup> Cir. 1983)(*en banc*).

While the plaintiff and plaintiff's counsel were cognizant of the court's orders entered before judgment, they were not

aware of the entry of the *judgment* itself. Under the new electronic filing and posting system, no notices are distributed by postal mail to counsel. Counsel is taking steps to assure that his own e-mail office site will receive clerks' notices in the future.

It is acknowledged, and should even be emphasized, that in sending the e-mail message to the former employee of Josephson & Associates, P. C., the Clerk acted appropriately, and there is no claim here to the contrary. On the other hand, that employee minimized or did not understand the significance of the e-mail message sent to him. See Affidavit of Andrea Williams, Attachment A.

The provisions of Federal Rule of Civil Procedure 60(b)(1) permits courts to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect", on motion made within one year of the judgment. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership et al.*, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). In that case, speaking for the Supreme Court majority, Justice White stated that "excusable neglect" even encompasses situations in which the failure to comply with a filing deadline is attributable to negligence.

DATED this 15<sup>th</sup> day of January, 2008 in Anchorage, Alaska.

          /s/Joe P. Josephson            
Joe P. Josephson  
Attorney for Plaintiff

